UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

625 Indiana Avenue N.W., Suite 900

Washington, D.C. 20004

CONLEY F MONK, *Petitioner*, v.	Docket No. 15-1280
DAVID J. SHULKIN, M.D., SECRETARY OF VETERANS AFFAIRS, in his official capacity, *Respondent*.	February 8, 2018

AMICUS BRIEF OF ADMINISTRATIVE LAW, CIVIL PROCEDURE, AND FEDERAL COURTS LAW PROFESSORS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES

RULES & REGULATIONS

OTHER AUTHORITIES

INTEREST OF AMICI CURIAE

Amici teach and write in the fields of administrative law, civil procedure, and the jurisprudence of federal courts.[1] Amici are listed in the Appendix and take no position as to whether aggregation in this particular case is warranted.

INTRODUCTION

On October 26, 2017, the Court of Appeals for Veterans Claims (CAVC or Veterans Court) invited interested amici to submit memoranda of law responding to twelve questions related to the certification of class actions in the Veterans Court. This memorandum of law addresses questions 1, 5, 6, and 7 in the Court's October 26 Order. In doing so, we make the following four points:

First, the Court may draw on the well-established framework for class certification as set forth in Fed. R. Civ. P. 23. Borrowing from federal class action rules can help guide parties' briefing and motion practice, quickly resolve pending claims, while offering the Court insights that will aid in developing more formal rules in the future.

Second, appellate level tribunals have broad discretion to aggregate cases. Assuming the Court is not barred from finding facts, the CAVC can resolve evidentiary issues in class actions using tools commonly used by other appellate courts and three-judge panels.

[1] No counsel for a party authored this brief in whole or in part. No person other than amicus curiae or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Third, courts often retain discretion to direct that notice be provided to proposed class members in injunctive relief cases, so long as it will not unduly delay or otherwise hinder the class action. Because the relief sought in injunctive and declaratory relief actions often will apply the same way for the whole class, however, courts and agencies rarely permit parties to opt out of such actions. Amici are not aware of any court or agency that has adopted an opt-in approach to class actions seeking injunctive relief.

Fourth, class actions generally are superior to precedential decisions when (1) petitioners' claims might be rendered moot; (2) a class will facilitate the enforcement of judgments by class members; (3) there is no certainty the defendant would apply judgments that bind individuals to similarly situated persons; and (4) the class-wide relief will effectively bring about institutional change. Class resolution of such claims ensures that relief is provided expeditiously, consistently, and fairly to all members of the class.

ARGUMENT

1. What framework should the Court use to determine whether class/aggregate action is warranted (for example, Federal Rule of Civil Procedure 23; an omnibus rule (*see, e.g.*, Office of the Special Masters of the U.S. Court of Federal Claims); or another framework) to reflect the unique nature of this appellate court?

Response: The Court may draw on the well-established framework for class certification set forth in Fed. R. Civ. P. 23.

A. Rule 23 of the Federal Rules of Civil Procedure Offers an Established Framework to Develop a Class Action Rule and Procedures.

Rule 23 of the Federal Rules of Civil Procedure offers a well-established framework this Court can use to develop its own class action rule and procedures. *See* Michael D. Sant'Ambrogio & Adam S. Zimmerman, *The Agency Class Action,* 122 Colum. L. Rev. 1992 (2012) (recommending rules for agency adjudication modeled on Rule 23). For over 50 years, federal courts have developed a rich body of experience, case law and guidance under the modern class action rule. Judith Resnik, *Reorienting the Process Due: Using Jurisdiction to Forge Post-Settlement Relationships Among Litigants, Courts and the Public in Class and Other Aggregate Litigation*, 92 N.Y.U. L. Rev. 1017, 1025 (2017) (describing evolution of the modern class action over the past 50 years).

For that reason, the Administrative Conference of the United States recommends that agencies developing aggregation rules consider "the principles and procedures in Rule 23 of the Federal Rules of Civil Procedure" and "ensure that the parties' and other stakeholders' interests are adequately protected" consistent

with due process. Aggregation of Similar Claims in Agency Adjudication, 81 Fed. Reg. 40,260-61 (June 21, 2016) (Recommendation Nos. 5 and 6). Such rules may include consideration of, among other factors, whether: (1) the number of cases or claims are "sufficiently numerous and similar" to justify aggregation, (2) aggregate litigation will "materially advance" the resolution of the cases, (3) "adequate counsel" represents the parties, and (4) "separate interests are adequately represented in order to avoid conflicts of interest." *Id.* The American Law Institute's Principles of Aggregate Litigation, which identifies best practices for judges and legislators adopting aggregate procedures, similarly recommends class adjudication of common issues when class treatment will "materially advance resolution," "ensure adequate representation," and do "not compromise the fairness of procedures for resolving any remaining issues." American Law Institute, Principles of the Law of Aggregate Litigation § 2.02 (2010) (hereinafter, ALI Principles of Aggregate Litigation).

All nine non-Article III courts and agencies that have adopted a class action rule have modeled their procedures, at least in part, after Fed. R. Civ. P. 23:

Bankruptcy Court Fed. R. Bankr. P. 7023	adopting Rule 23 wholesale
Board of Governors of the Federal Reserve 12 C.F.R. § 268.204	tracking Rule 23(a), but not Rule 23(b)
Consumer Financial Protection Bureau 45 C.F.R. § 1225.13	provisions for class complaints prior to EEOC hearings modeled after Rule 23(a)

Consumer Product Safety Commission 16 C.F.R. § 1025.18	loosely tracking Rule 23
Corporation for National and Community Service 12 C.F.R. § 1072.112	provisions for class complaints prior to EEOC hearings modeled after Rule 23(a)
Court of Federal Claims R. Ct. Fed. Cl. 23	adopting most, but not all, of Rule 23
Equal Employment Opportunity Commission 29 C.F.R. § 1614.204	tracking Rule 23(a), but not Rule 23(b)
Government Accountability Office Personnel Appeals Board 4 C.F.R. § 28.97	provisions for class complaints prior to EEOC hearings modeled after Rule 23(a)
Merit System Protection Bureau 5 C.F.R. § 1201.27(c)	"guided by but not controlled by" Rule 23

Michael Sant'Ambrogio & Adam S. Zimmerman, *Inside the Agency Class Action,* 126 Yale. L.J. 1634 (2017). Indeed, the first federal agency to adopt class action rules, the now-defunct Civil Service Commission (CSC), changed its originally proposed rule in response to complaints that it did not track Rule 23 closely enough.[2] Responding to the "many" comments it had received, the CSC adopted final rules to "provide greater conformity with the Federal Rules of Civil Procedure concerning class actions." *See* 42 Fed. Reg. 11,807, 11,808 (March 1, 1977), 1977

[2] The CSC adopted class action rules in response to a lawsuit brought by the NAACP Legal Defense Fund. The suit alleged that federal employees lacked adequate procedures to pursue "pattern and practice" claims of discrimination in federal government. *Barrett v. U.S. Civil Service Comm'n*, 69 F.R.D. 544, 550 (D.D.C. 1974). Under the CSC's original rule, twenty-five plaintiffs were required to affirmatively consent to commence a class action. Following certification, the parties would notify class members, who in turn, had a right to opt out. The proposed rules also defined commonality differently, and no provisions existed for "typicality" or "adequacy of representation."

WL 213079 (clarifying that it had changed "the definitions, scope, and criteria for" class actions "to conform as closely as possible with Rule 23, Federal Rules of Civil Procedure").

The Federal Rules of Civil Procedure also provide a predictable source of guidance for courts aggregating cases without a formal rule. *Monk v. Shulkin*, 855 F.3d 1312, 1319 (Fed. Cir. 2017) ("We see no principled reason why the Veterans Court cannot rely on the All Writs Act to aggregate claims in aid of that jurisdiction."). The Federal Rules offer the parties and the Court a ready-made body of law to help them navigate new "uncharted waters" the Court acknowledged it will face following the Federal Circuit's decision in *Monk*. *Monk v. Shulkin*, 15-1280, slip op. at 5 (Ct. Vet. App. Jan. 23, 2018). Borrowing from federal class action rules can help guide parties' briefing and motion practice, quickly resolve pending claims, and provide critical experience for the Court as it develops more formal aggregate rules in the future. *Quinault Allottee Ass'n & Individual Allottees v. United States*, 453 F.2d 1272, 1274 (Ct. Cl. 1972) (observing that "the better road to follow" was to hear class actions modeled on Rule 23 on a "case-by-case basis, gaining and evaluating experience as we study and decide the class-suit issues presented by individual, concrete cases coming up for resolution"). For this reason, other courts that have chosen to aggregate cases on a case-by-case basis have similarly looked to the Federal Rules as a guide. *See United States ex rel. Sero v. Preiser*, 506 F.2d 1115, 1125–26 (2d Cir. 1974) (finding federal courts in habeas cases may aggregate cases through "appropriate modes of procedure, by analogy to

existing rules [such as Rule 23]or otherwise in conformity with judicial usage"); *Quinault Allottee Ass'n*, 453 F.3d at 1274-76 (informally adopting class action rules derived from Rule 23 of the Federal Rules of Civil Procedure).

Accordingly, the Court would be well-served by following Rule 23(b)(2), which governs the kinds of actions for declaratory and injunctive relief this Court is likely to hear. As we discuss below in response to Question No. 6, Rule 23(b) also provides a helpful framework for identifying the procedures to ensure notice, participation and complete relief in such cases. Non-Article III courts and agencies have adopted rules principally for injunctive or declaratory relief that do not require parties to show that common issues "predominate" over individual issues under Rule 23(b)(3). *See, e.g.,* 12 C.F.R. § 268.204 (2003) (utilizing aspects of Rule 23(a), but not 23(b), in Board proceedings); 29 C.F.R. § 1614.204 (2009) (utilizing aspects of Rule 23(a), but not 23(b), in EEOC proceedings). And they also permit courts to group together common scientific, technical, or legal questions, even where many individual questions remain. *See, e.g.*, Sant'Ambrogio & Zimmerman, *Inside the Agency Class Action*, *supra*, at 1691 (noting how the EEOC uses "mini-trials to test individual claims and defenses remaining in adjudications involving damages").

B. Omnibus Proceedings Are More Analogous to Damage Class Actions and Multi-District Litigation Than Class Actions Seeking Injunctive Relief

Omnibus proceedings, like those used by the National Vaccine Injury Compensation Program (the Vaccine Court), have not been used for the kinds of injunctive relief cases that the CAVC is likely to hear. The Vaccine Court developed

omnibus proceedings as a method for resolving large numbers of individual actions seeking damages for injuries caused by a particular vaccine. Sant'Ambrogio & Zimmerman, *Inside the Agency Class Action*, *supra*, at 1673. Although the cases all sought individual relief, they also presented common, yet still-evolving and complex scientific questions of causation. *Id.* at 1672. As we discuss below, omnibus proceedings are more analogous to damage class actions under Rule 23(b)(3), or the kinds of bellwether trials seen in federal multidistrict litigation. But even as omnibus proceedings allowed the Vaccine Court to narrow and expedite individual damage cases, they are not designed to provide relief from a defendant whose conduct "appl[ies] generally to the class," like a Rule 23(b)(2) class action for injunctive relief.

The Vaccine Court first used an omnibus proceeding when confronted with 130 cases alleging that a rubella vaccine caused chronic arthritis and related problems. *Id.* A Special Master encouraged the plaintiffs' attorneys to form a steering committee to coordinate the presentation of expert evidence on the general question of causation—*e.g.*, whether it is "'more probable than not' that a rubella vaccination can cause chronic or persistent [arthropathy]." *Ahern v. Sec'y of the Dep't of Health and Hum. Servs.*, No. 90-1435V, 1993 WL 179430 at *3 (Fed. Cl. Spec. Mstr. Jan. 11, 1993). The conclusions reached on the causation question were then entered as a case management order in the individual cases, requiring the plaintiffs to put forward evidence consistent with the Vaccine Court's findings regarding what is necessary to establish causation—*e.g.*, acute onset of arthritis, no

history of pre-existing conditions, etc. Sant'Ambrogio & Zimmerman, *Inside the Agency Class Action*, *supra*, at 1672-73. In this way, the resolution of the general question of causation expedited the evaluation of the individual cases either through hearings, settlements, or dismissal. *Id.* at 1673.

This type of omnibus proceeding is analogous to a class action for damages certified pursuant to Rule 23(b)(3) & (c)(4). The relief sought in the cases is divisible—each party seeks individual compensation for its own injury—but the Vaccine Court utilizes aggregation to resolve "questions of law or fact common to the class." It is unlike a class action in which petitioners seek "final injunctive relief or corresponding declaratory relief … respecting the class as a whole." Fed. R. Civ. P. 23 (b)(2).

More often, the Vaccine Court uses omnibus proceedings that perform the same function as "bellwether trials" in federal multidistrict litigation. *See* Manual for Complex Litigation, Fourth § 22.756 (Fed. Judicial Ctr. 2004); Alexandra D. Lahav, *Bellwether Trials*, 76 Geo. Wash. L. Rev. 576 (2008). In a bellwether trial, the parties select a small group of cases for jury trial out of a larger pool of similar claims. Steering committees of plaintiff and defense lawyers then use information gleaned from those trials to resolve the remaining cases. For example, in the Omnibus Autism Proceeding, the Vaccine Court described how it typically uses omnibus proceedings:

> [B]y the agreement of the parties, the evidence adduced in the omnibus proceeding is applied to other cases, along with any additional evidence adduced in those particular cases. The parties are … not bound by the results in the test case, only agreeing that the

> expert opinions and evidence forming the basis for those opinions could be considered in additional cases presenting the same theory of causation. *Snyder ex rel. Snyder v. Sec'y of Dep't of Health & Hum. Servs.*, No. 01-162V, 2009 WL 332044, at *4 (Fed. Cl. Feb. 12, 2009) (citations omitted).

Therefore, omnibus proceedings may prove useful if the CAVC is confronted with a large number of individual cases seeking compensation that involve the same complex and unsettled question of fact, such as a general causation question. They will not be necessary, however, when petitioners pursue "indivisible" relief, like injunctive or declaratory relief, often sought in Rule 23(b)(1) and (b)(2) class actions. Indeed, we are not aware of any court or agency that has used an omnibus proceeding as an alternative to an injunctive class action seeking indivisible relief on behalf of the class.

A class action certified under Rule 23(b)(2) already provides an efficient way for the Court to pool information about common questions and resolve the claims of the class members consistently and fairly. This seems particularly true when petitioners allege systemic harms to the class, and not merely a series of individual actions for damages. *See* ALI Principles of Aggregate Litigation § 2.04 cmt. a (observing that the difference "between divisible remedies and indivisible remedies … focuses on whether the distribution of relief to one claimant will 'as a practical matter' determine the application or availability of relief to other claimants."). For that reason, the ALI Principles recognize that such "indivisible remedies" are "handled generally under Rules 23(b)(1) and (b)(2) of the Federal Rules of Civil Procedure." *Id.*

5. **Is this Court able to make the findings necessary to certify a class, given that 38 U.S.C. § 7261(c) prohibits the Court from making factual findings in the first instance? *See Kyhn v. Shinseki,* 716 F.3d 572, 575-76 (Fed. Cir. 2013); *Andre v. Principi,* 301 F.3d 1354, 1362 (Fed. Cir. 2002). Assuming the Court would not be barred from making such findings, what mechanism(s) should the Court use to do so (e.g., mandatory disclosures, preliminary record by the Secretary, discovery, etc.)?**

   Response: Assuming the Court is not barred from finding facts, the CAVC can resolve evidentiary issues in class actions using the same tools used by other appellate courts and three-judge panels.

   Amici do not express an opinion about the CAVC's authority to find facts.

Assuming the Court is not precluded from finding facts in aid of its authority to certify class actions, however, Amici respond to Question 5 in order to highlight the experience of other three-judge panels and appellate bodies that the CAVC may draw upon to develop fact-finding procedures to manage class actions.

A. Non-Article III Courts Aggregate at the "Appellate" Level.

Appellate level tribunals have broad discretion to aggregate cases. Many appellate bodies in administrative agencies consolidate cases that raise "common questions of law or fact," including the Provider Reimbursement Review Board, 42 C.F.R. § 405.1837 (granting right to Board hearing, as part of a "group appeal" with other providers, with respect to certain determinations), the Environmental Appeals Board, 40 C.F.R. § 22.12 (authorizing the "Board to consolidate proceedings for civil penalties or revocation of permits where there are common issues of law or fact"), and the Office of Medicare Hearings and Appeals (OMHA), 42 C.F.R. § 405.1044 (consolidation in OMHA for purposes of "administrative efficiency"). The Court of International Trade, an Article III court, hears administrative appeals

and has allowed class actions since the early 1990s. *See Nat'l Bonded Warehouse Assoc. v. United States*, 14 C.I.T. 856 (Ct. Int'l Trade 1990).

Indeed, even the United States Supreme Court, the highest appellate court in the nation, utilizes aggregation. Rule 12.4 of the Rules of the Supreme Court expressly allows parties to seek review of multiple judgments using a single petition; and of course, the Supreme Court routinely consolidates separate petitions for certiorari. Last year, for example, 166 service members brought a consolidated petition in the Supreme Court in order to set aside their convictions. They jointly claimed that the composition of their reviewing tribunals violated the Appointments Clause of the Constitution and a federal law barring military officials from holding civil office. *See* Pet. Brief in *Abdirahman v. United States*, No. 17-243 (Jul. 31, 2017), https://www.justsecurity.org/wp-content/uploads/2017/07/Abdirahman-Petition.pdf. The procedure ensures that parties will not forfeit their rights to timely appeal and receive a judgment from the Supreme Court on their common claims.

Moreover, federal district courts may aggregate cases even when functioning in an "appellate" capacity, reviewing an agency's findings of fact and conclusions of law. Federal courts have certified class actions to review systematic practices in a variety of programs, including—before 1988—veteran benefits cases. *See, e.g. Bowen v. City of New York*, 476 U.S. 467 (1985) (social security); *Nehmer v. U.S. Veterans' Admin.*, 118 F.R.D. 113 (N.D. Cal. 1987) (certifying nationwide plaintiff class of Vietnam veterans eligible for Agent Orange benefits); 7AA Charles A. Wright et al., Federal Practice and Procedure § 1775 (3d ed. 2008) (collecting cases

where “Rule 23(b)(2)...has been used extensively to challenge” complex benefit schemes.).

Notably, the CAVC’s “scope of review” of Board of Veterans Appeals (BVA) decisions, as set forth in 38 U.S.C. § 7261(a)(2) (2002), “is similar to that of an Article III court reviewing agency action under the Administrative Procedure Act.” *Henderson v. Shinseki*, 562 U.S. 428, 432 n.2 (2011).

B. Appellate Courts May Rely on Other Judicial Officers to Develop Facts.

Adjudicating class actions requires procedures to manage fact-finding, motion practice, and settlement conferences. This Court may need to develop evidence of the propriety of class treatment, including via pre-certification discovery.

Appellate courts, like the CAVC, possess broad and flexible powers under the All Writs Act (AWA), their inherent judicial powers, and their organic statutes to adopt rules to address these matters. *See Monk*, 855 F.3d at 1318 (noting all three sources); *Gulf Power Company v. United States*, 187 F.3d 1324, 1334-35 (11th Cir. 1999) (noting five different techniques appellate courts might use to resolve factual disputes). This Court might consider several different procedures, including: (1) transferring evidentiary matters to a single judge of this court; (2) appointing a special master or magistrate, or (3) tailoring appropriate rules under its AWA authority in specific cases.

First, the Court could fashion a procedure to transfer aggregate actions to a single judge. This would mirror the Hobbs Act, which governs agency appeals to

the U.S. Courts of Appeals and authorizes transfer to a district court for the purpose of fact-finding in some situations. 28 U.S.C. § 2347(b)(3) (2012); *see, e.g.*, *Gallo-Alvarez v. Ashcroft*, 266 F.3d 1123, 1129-1130 (9th Cir. 2001) (transferring immigration petition for review to district court "for further development of the record"). Although the Hobbs Act does not apply directly to this Court's review of agency action, a similar rule could be fashioned pursuant to the CAVC's AWA authority that allows transfer to a single judge or a recalled retired judge. *See, e.g.*, 38 U.S.C. § 7254(b) (2012) (single judges); 38 U.S.C. § 7257 (2012) (retired judges). The Court already disposes of most cases through single-judge decisions. James Ridgway, Bart Stichman, & Rory Riley, *'Not Reasonably Debatable': The Problems with Single-Judge Decisions by the Court of Appeals for Veterans Claims*, 27 Stan. L. & Pol'y Rev. 1 (2016) (surveying over 4,000 single judge decisions in two years). A single judge could address fact-finding about the putative group, resolve evidentiary disputes, and ensure a complete record for review by the three-judge panel.

Second, courts may rely on special masters. *See, e.g.*, *New Jersey v. New York*, 523 U.S. 767, 771 (1998) (noting trial held by special master appointed in matter of original jurisdiction before U.S. Supreme Court); Fed. R. App. P. 48 (courts of appeals may "appoint a special master to hold hearings"). Although courts are not bound by a special master's findings, reliance on special masters is commonplace. Shira Scheindlin, *We Need Help: The Increasing Use of Special Masters in Federal Court*, 58 DePaul L. Rev. 479 (2009).

Article III appellate courts use special masters to resolve factual disputes when issues arise for the first time at the appellate level. *See* Fed. R. App. P. 48 advisory committee's note to 1994 amendment. Special masters regulate "all aspects of a hearing" and can administer oaths, examine witnesses, and require "the production of evidence on all matters embraced in the reference." Fed. R. App. P. 48(a)(1)-(4). The United States Supreme Court itself utilizes special masters when it needs to find facts in cases within its original jurisdiction. Anne-Marie C. Carstens, *Lurking in the Shadows of Judicial Process: Special Masters in the Supreme Court's Original Jurisdiction Cases*, 86 Minn. L. Rev. 625, 628 (2002) ("the Court has acknowledged the appointment of Special Masters in original jurisdiction cases as standard practice"). *See also* Sup. Ct. R. 17(2) (2017) ("The form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed. In other respects, those Rules and the Federal Rules of Evidence may be taken as guides."). And trial courts frequently use special masters in complex litigation to improve fact-finding and facilitate settlement talks. *See* Manual for Complex Litigation, Fourth § 22.91 (describing use of special masters).

Finally, under the AWA, appellate courts may permit case-by-case fact-finding and the production of records. In *Harris v. Nelson*, for example, the Supreme Court allowed a district court to compel interrogatories in a habeas case, even where no express rule for interrogatories was available. 394 U.S. 286, 300 (1969) ("it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry" into the petitioner's claim). This Court too may rely on its

AWA authority to authorize necessary proceedings "in order that a fair and meaningful evidentiary hearing may be held."[3] *Id.*

6. If the Court decides to certify a class, should the Court direct any notice to the class members? In answering this question, please also address whether class members should have the right to opt out of the class and, if so, what notice should be provided on that matter. Also, should the Court adopt an opt-in approach instead? *See* Fed. R. Civ. P. 23 (c)(2).

Response: Courts may direct that notice be provided to proposed class members so long as it will not unduly delay or otherwise hinder the class action. Because the relief sought in injunctive and declaratory relief actions often apply the same way for the whole class, however, courts and agencies only rarely permit parties to opt out from such actions. Amici are not aware of any court or agency that has adopted an opt-in approach to class actions seeking injunctive relief.

A. Although Not Necessary, Courts May Direct that Notice Be Provided to the Class When It Does Not Interfere With or Unduly Delay the Litigation.

Courts carefully weigh the costs and benefits of any notice to proposed members of a class seeking injunctive relief. Actions for injunctive and declaratory relief, like cases that the CAVC traditionally hears, need not follow the same procedural formalities as damages class actions. The Federal Rules of Civil Procedure do not require declaratory or injunctive relief class actions to (1) provide notice of the decision to certify the class; (2) offer people a chance to opt out of the action, (2) show that common issues will "predominate" over individual questions or (3) establish that a class action is superior to other forms of adjudication. *See*

[3] Fact-finding by a multi-judge court does not present any difficulties. It is not uncommon for Article III courts conduct full-blown trials in three-judge panels. *See, e.g.*, 18 U.S.C. § 3626 (2012) (requiring three-judge district court for certain prison conditions cases); 28 U.S.C. § 2284 (2012) (same, as to congressional reapportionment cases). In addition, numerous multi-member administrative agencies, such as the National Labor Relations Board, the Federal Trade Commission, and the Securities and Exchange Commission, engage in fact finding when adjudicating cases.

Fed. R. Civ. P. 23 (b)(2), (b)(3) & (c)(2). This is because an injunction against a generally applicable policy or practice will impact all class members in the same way. *See* ALI Principles of Aggregate Litigation **§** 2.04 cmt. a (distinguishing classes pursuing "prohibitory injunctive or declaratory relief against a generally applicable policy or practice" from class actions that seek money damages); William B. Rubenstein, 2 Newberg on Class Actions § 4:36 . As the Supreme Court has observed: "The key to the [injunctive or declaratory relief] class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Wal-Mart Stores Inc. v. Dukes*, 564 U.S. 338, 360 (2011) (internal citation omitted). Moreover, notice can be expensive and burdensome. Requiring notice to members of the class can make it impossible or impractical to bring the class action or unnecessarily slow down the litigation without any meaningful benefits.

On the other hand, notice "may be especially valuable" with respect to some injunctive relief claims. ALI Principles of Aggregate Litigation § 2.07 cmt. f. First, notice gives class members an opportunity to voice objections to the terms of any settlement or the award of attorney's fees. Fed. R. Civ. P. 23 (e) & (h) (notice of proposed settlement and award of attorney's fees).

Second, notice provides members of the class with the opportunity to monitor and participate in the litigation. Manual for Complex Litigation, Fourth § 21.311 ("Notice to members of classes certified under Rule 23(b)(1) or (b)(2)

serves limited but important interests, such as monitoring the conduct of the action."). In aggregate proceedings to enjoin employment discrimination, prison litigation, or other civil rights violations, claimants may "possess valuable information," "considerable stakes in the outcome," and "conflicting interests" in an injunction that prescribes "affirmatively a course of future conduct on the defendant's part." ALI Principles of Aggregate Litigation § 2.07 cmt. f. In so doing, courts provide class members with a chance to have "transformative exchanges about . . . social and moral" commitments, which may be particularly important in cases involving the provision of government benefits. Judith Resnik et al., *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. Rev. 296, 382 (1996) (summarizing democratic theories involving access to litigation).

For this reason, it is generally within the discretion of a federal court whether to direct that notice be provided at the class certification stage to members of a proposed class under Rule 23(b)(2). *See* Fed. R. Civ. P. 23(c)(2)(A) ("[f]or any class certified under Rule 23(b)(1) or (2), the court *may* direct appropriate notice to the class") (emphasis added); 2 Newberg on Class Actions § 4:36; ALI Principles of Aggregate Litigation § 2.07 (recognizing need to "tailor notice to those instances of indivisible relief in which individual notice would be valuable."). But that discretion should be "exercised with care," as the Federal Rules Advisory Committee observes:

> The authority to direct notice to class members in a (b)(1) or (b)(2) class action should be exercised with care. For several reasons, there

> may be less need for notice than in a (b)(3) class action. There is no right to request exclusion from a (b)(1) or (b)(2) class. The characteristics of the class may reduce the need for formal notice. The cost of providing notice, moreover, could easily cripple actions that do not seek damages. The court may decide not to direct notice after balancing the risk that notice costs may deter the pursuit of class relief against the benefits of notice.

Fed. R. Civ. P. 23 advisory committee's notes (2003).

B. Courts Take a Flexible Approach to Directing Notice to Members of a Class Seeking Injunctive Relief.

The standards for providing notice to members of a Rule 23(b)(2) class are more lenient than for a Rule 23(b)(3) class. Because class actions seeking monetary damages raise due process concerns and require opt out rights, class members must receive the best practicable individualized notice. *See* Fed. R. Civ. P. 23 (c)(2)(B) ("For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."). In Rule 23(b)(2) actions, however, courts generally do not require any notice to be individualized. For example, "[a] simple posting in a place visited by many class members, directing attention to a source of more detailed information, may suffice." Fed. R. Civ. P. 23 advisory committee's notes (2003). *See also* Manual for Complex Litigation, Fourth § 21.311 ("If notice is appropriate, it need not be individual notice because, unlike a Rule 23(b)(3) class, there is no right to request exclusion from Rule 23(b)(1) and (b)(2) classes.").

Rule 23(b)(2) does not require more individualized notice for several reasons. First, because parties often cannot opt out of class actions for injunctive

relief, individualized notice may serve "little function." 2 Newberg on Class Actions § 8:3. Second, the "importance of individualized notice recedes" in Rule 23(b)(2) actions because the parties share similar interests in relief. *Id.* Third, parties in injunctive and declaratory relief cases often have preexisting relationships, and thus, may already know about the action. *See id.* (noting that members of a mandatory class action "will at times have a prelitigation social relationship with one another . . . that may enable knowledge of a shared lawsuit to circulate without formal notice"). Finally, changes in technology, including the rise of internet-based communication and social media, mean that "individualized notice as conventionally understood may not necessarily be the best notice that is practicable." ALI Principles of Aggregate Litigation § 2.07 cmt f; *see also* Manual for Complex Litigation, Fourth § 21.311 ("[Internet notice] might be provided at a relatively low cost, and will become increasingly useful as the percentage of the population that regularly relies on the Internet for information increases."); Alexander W. Aiken, *Class Action Notice in the Digital Age*, 165 U. Pa. L. Rev. 967 (2017) (examining proposed changes to Federal Rule of Civil Procedure 23 that would explicitly authorize courts to direct notice electronically).

In this case, the Secretary has volunteered to provide notice to the class members if the Court certifies a class. So long as the notice approved by the Court does not delay or otherwise hinder the litigation, allowing the Secretary to provide notice to members of the proposed class rests within the sound discretion of the

CAVC and would be consistent with aggregate procedures followed in other courts and agencies.

C. Courts Do Not Use Opt-In Approaches in Injunctive Relief Classes, But May Provide Opt Out Rights in an Appropriate Case.

The Federal Rules of Civil procedure do not require that parties receive the right to opt out of an injunctive relief class action, but opt-out rights "are discretionary, may be permitted, and have been employed..." 2 Newberg on Class Actions § 4.36. The few circumstances in which federal courts have permitted parties to opt out from a 23(b)(2) class are when the members of the class seek both injunctive relief and monetary damages. 2 Newberg on Class Actions § 9.51 ("cases in which courts have enabled class members to opt out of (b)(1) or (b)(2) classes tend to be those that involve individualized monetary damages") (collecting cases). Thus, while both notice and opt out are discretionary in 23(b)(2) actions, courts are more likely to notify parties of the action than permit them to opt out. Amici are unaware of any federal court requiring plaintiffs to *opt in* to a 23(b)(2) class action for injunctive relief.[4] Commentary exploring opt in provisions for class actions have focused exclusively on damage class actions. *See*, *e.g.*, Scott Dodson, *An Opt In*

[4] The Secretary suggests that opt-in is required because the CAVC will "require the Secretary to skip statutorily mandated processes and rights for many members of the class." Sec'y Br. at 47. However, the CAVC retains power to issue writs of mandamus against the government. Moreover, the use of a class action does not hurt the rights of people affected by that petition, but instead affords them a voice in the indivisible relief that would otherwise be available to all of them. *See* 2 Newberg on Class Actions § 4.34 ("where (b)(2) certification conditions exist, certification does not punish class members, it assists them; it is mandatory not out of malice but benefice—an acknowledgement of the real world effect of even individual litigation.").

Option For Class Actions, 115 Mich. L. Rev. 171, 173 n.5 (2016) (excluding "mandatory class actions" for injunctive relief and exploring whether plaintiffs commencing damage class actions should have the option to proceed on an opt-in basis with the prospect of easier certification).

The general reason given for barring opt outs in injunctive relief cases is that the fate of all of the claims are "already intertwined." ALI Principles of Aggregate Litigation 2.07 cmt h. A declaratory lawsuit that "a particular employment practice is unlawful, for example, would likely cause the defendant to alter its practices across the board, to the benefit or detriment of all subject to the practice in question." *Id.* In such cases, certifying a mandatory class actually advances the parties' due process interests by (1) creating a forum where all interested parties can voice their opinions, (2) enabling a court to "craft an indivisible remedy" that takes into account those divergent interests, and (3) avoiding the "risk of inconsistent adjudications and relief." *Id. See also Allen v. Int'l Truck & Engine Corp*., 358 F.3d 469, 471 (7th Cir. 2004) ("class certification obliges counsel … to proceed as fiduciaries for all [affected] employees, rather than try to maximize the outcome for" 27 employees with filed lawsuits "at the potential expense of the other 323").

Amici are not aware of any cases decided since the Supreme Court's decision in *Wal-Mart Stores Inc. v. Dukes*, 564 U.S. 338 (2011) where courts have permitted parties to opt out of class actions seeking purely injunctive relief. *Compare, e.g.*, *Ebert v. Gen. Mills, Inc.*, 823 F.3d 472, 480 (8th Cir. 2016) ("Because a (b)(2) class is mandatory, the rule provides no opportunity for (b)(2) class members to opt

out[.]"); *Berry v. Schulman*, 807 F.3d 600, 609, 612 (4th Cir. 2015) (citation omitted) (rejecting objectors' request to opt out of (b)(2) class on ground that opt-out is not provided by the Rule and is "unnecessary" because "the relief sought is uniform"). Nor are amici aware of situations in which opt out rights were granted in a class action challenging the delay of administrative action. *Compare, e.g.*, *Reynolds v. Giuliani*, 118 F. Supp. 2d 352, 391–92 (S.D.N.Y. 2000) (certifying a mandatory class action involving the administration of food stamps); *White v. Mathews*, 434 F. Supp. 1252, 1253 (D. Conn. 1976), *aff'd*, 559 F.2d 852 (2d Cir. 1977) (approving certification of mandatory class of plaintiffs alleging extensive delays in the scheduling and completion of hearings before an administrative law judge). Nevertheless, the CAVC could retain discretion to provide class members with opt out rights if and when an appropriate case arises.

7. How would a class action be superior to a precedential decision from this Court in fairly and efficiently adjudicating the due process issue raised by the petitioner? Does the type of relief the petitioner seeks from the Court play a role in determining whether the Court should issue a precedential decision or certify a class?

Response: Class actions are generally superior to precedential decisions when (1) petitioners' claims might be rendered moot; (2) a class facilitates the enforcement of judgments by class members; (3) there is no certainty the defendant would apply judgments uniformly to the class members; and (4) the class will effectively bring about institutional change. Class resolution of such claims ensures that relief is provided expeditiously, consistently, and fairly to all members of the class.

In large government benefit programs, class actions that satisfy the requirements of Rule 23(a) and (b)(2) are generally superior to precedential decisions. In such cases, the class action provides a more efficient means of

providing consistent relief to similarly situated parties, who often lack access to the affordable counsel they need to find and apply a precedential decision. Neither injunctive relief, nor stare decisis guarantees the uniform enforcement of class action outcomes, binding impact, and legal access that aggregate adjudication provides. Sant'Ambrogio & Zimmerman, *The Agency Class Action*, *supra*, at 2024-25 (describing advantages of binding aggregate judgment over precedent in mass adjudication systems); 2 Newberg on Class Actions § 4.35 ("Class certification serves one central function even if an individual action [against the government] would itself achieve the class's ends—class certification ensures that the class is adequately represented..."). Many courts do not question the comparative advantages of class actions versus injunctive relief in individual cases when all the requirements of 23(a) and 23(b)(2) are met. *See, e.g., Charlebois v. Angels Baseball, LP*, 2011 WL 2610122, *11 (C.D. Cal. 2011) (finding that to preclude class actions because a plaintiff could bring an individual action for injunctive relief "would deem moot the language of Rule 23(b)(2)"); *Disability Rights Council of Greater Washington v. Washington Metropolitan Area Transit Authority*, 239 F.R.D. 9, 23 (D.D.C. 2006) ("the idea that a class may be certified only if 'necessary' flies in the face of the Federal Rules") (internal quotation marks omitted); 2 Newberg on Class Actions § 4.35 (collecting cases).

The Secretary urges the Court to adopt a "necessity rule" before certifying a class action. Sec'y Br. at 11. Some courts have held that class actions seeking injunctive relief are unnecessary if "an injunction obtained in an individual suit may

have the same effect as one obtained in a class suit." 2 Newberg on Class Actions § 4.3. This "necessity doctrine," however, is a very controversial idea that subverts the very purpose of injunctive relief class actions against government entities, "a result hardly intended by the Rules Advisory Committee." *Id.* ("Like Newton's Law of Thermodynamics, for every class denial on the basis of lack of need, one is able to find a decision, or several decisions, often in the same circuit, where other courts have certified Rule 23(b)(2) classes under virtually the same circumstances.") (collecting cases). Consequently, many courts have rejected the necessity doctrine because it has no textual basis in Rule 23 and because it is inconsistent with the goals of aggregation. And, in many cases, individual injunctions simply will not have the same effect as class injunctions, particularly if one takes into account who has the right to enforce them.[5]

Moreover, courts have found class actions "necessary" and superior to precedential decisions in individual cases when: (1) "the plaintiff's claims might be rendered moot"; (2) "a class would facilitate enforcement of the judgment by class members"; (3) "there [is] no certainty that the defendant would apply the judgment uniformly to all members of the proposed class"; or (4) "a class [is] an effective device to bring about institutional change." 2 Newberg on Class Actions § 4.35 (collecting cases); *Karen L. ex rel. Jane L. v. Physicians Health Services, Inc*., 202

[5] For example, in other cases, the government has argued that injunctive relief must be limited to parties to the action. *See, e.g.*, Defs. Mot. To Dismiss at 40, Batalla Vidal v. Nielsen, No. 16-4756 (E.D.N.Y. Oct. 27, 2017), ECF No. 95-1(seeking to narrow "injunction in part because the plaintiffs do not represent a class . . .").

F.R.D. 94, 103-04 (D. Conn. 2001) (collecting cases); *Nehmer*, 118 F.R.D. at 119-20 (rejecting necessity requirement and finding class action an effective tool to bring about change in the Veteran's Administration regulations). We address each consideration in turn.

A. Individual Adjudication May Render Petitioners' Claims Moot

A class action is superior to individual cases when petitioners allege unreasonable delays in the administration of benefits because class certification prevents the government defendant from mooting individual cases and avoiding a decision on the merits of the class-wide claim. *See, e.g.*, *Reynolds v. Giuliani*, 118 F. Supp. 2d 352, 391-92 (S.D.N.Y. 2000) (certifying a 23(b)(2) class involving the administration of food stamps because of the acute danger of mootness "due to the fluid nature of the class and the defendants' ability to moot the claims of the named plaintiffs, 'thereby evading judicial review of their conduct'"). In delay cases, it is particularly easy for government defendants to strategically moot individual cases by moving them to the "top of the pile," thereby preventing the Court from ever resolving the common questions at the heart of petitioners' class claims. *See White v. Mathews*, 434 F. Supp. 1252, 1253 (D. Conn. 1976), *aff'd*, 559 F.2d 852 (2d Cir. 1977) (approving the certification of class of plaintiffs alleging extensive delays in the scheduling and completion of hearings before an administrative law judge); *Monk*, 855 F.3d at 1316-18 (observing case law is "replete with such examples" of cases where the Veterans Administration (VA) "responds by correcting the problem

within the short time allotted for a response, and the petition is dismissed as moot because the relief sought has been obtained").

By contrast, the VA cannot moot a class action by resolving the claim of the named petitioner or appellant. *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 404 (1980). Thus, a class action ensures that the common claims of the veterans are heard even if the named petitioners' claims are resolved. *Monk*, 855 F.3d at 131 (observing that a "claim aggregation procedure" avoids mootness and thus "may help the Veterans Court achieve the goal of reviewing the VA's delay in adjudicating appeals" (quoting *Young v. Shinseki*, 25 Vet. App. 201, 215 (2012)).

B. A Class Action Will Facilitate Enforcement of the Judgment.

A class action will make it easier for class members to enforce the judgment of this Court. Indeed, the Rule 23(b)(2) class action was developed in part to make it easier for the intended beneficiaries of injunctive relief to enforce federal court judgments. *See* Maureen Carroll, *Class Action Myopia*, 5 Duke L.J. 843, 859-60 (2016).

Issuing an injunction in an individual case rather than a class action shifts control over the scope of the injunction from the CAVC to the VA. *See* Daniel Tenny, *There Is Always A Need: The "Necessity Doctrine" and Class Certification Against Government Agencies*, 103 Mich. L. Rev. 1018, 1039 (2005) (noting that the government may believe an injunction in an individual case applies to a different group of beneficiaries than the court). To benefit from a decision in an individual case, other veterans would have to know about the Court's decision,

understand its relevance to their own case, convince the VA that they should benefit from a precedential decision, and if the VA disagrees, return to this Court and seek their own injunction. Moreover, most veterans would have to do this without the benefit of legal representation. Adjudication based on precedent and stare decisis requires lawyers to "find relevant precedents, interpret their significance to the case at hand, and advocate how they should be applied." Sant'Ambrogio & Zimmerman, *The Agency Class Action*, *supra*, at 2024. Consequently, precedential decisions in individual cases and stare decisis are weak tools for providing uniform relief to members of a proposed class in administrative systems short on legal representation. *Id.*

By contrast, when the Court issues a judgment granting relief in a class action, petitioners benefit from the CAVC's judgment in the class proceeding. *See Nehmer*, 118 F.R.D. at 119 ("Class actions enable unidentified class members to enforce court orders with contempt proceedings, rather than relying on the res judicata in a subsequent lawsuit."). In addition, petitioners may rely on class counsel and do not have to seek separate legal representation to protect their rights.

Facilitating enforcement is particularly important in cases seeking affirmative injunctive relief. *See Connecticut State Dep't of Social Servs. v. Shalala*, No. 3:99 CV 2020 , 2000 WL 436616, at *2 (D. Conn. Feb. 28, 2000) (class actions preferred when a mandatory, as opposed to a prohibitory, injunction is sought). When petitioners attempt to strike down a regulation on the grounds that it is inconsistent with a statute or the Constitution, it may be reasonable to expect the

government to no longer apply the regulation if it is struck down. In such cases, the court may feel confident that the government will provide prospective relief. But when petitioners seek affirmative relief—*e.g.*, that the Secretary "resolve their appeals in a uniformly expeditious manner"—the resolution of an individual case will not automatically provide relief to the rest of the class. *See, e.g.*, *Almendares v. Palmer*, 222 F.R.D. 324, 334 (N.D. Ohio 2004) (certifying a class of plaintiffs seeking bilingual services in food stamp program because, *inter alia*, it is "not clear that any injunctive relief awarded to an individual plaintiff will automatically inure to the benefit of the class as a whole").

Given the nature of the relief sought in most delay cases—expeditious adjudication of the petitioners' claims for benefits—individual relief may actually harm other members of the class by moving individual cases ahead of others. *See Ebanks v. Shulkin*, 877 F.3d 1037, 1039-40 (Fed. Cir. 2017) (recognizing that "[g]ranting a mandamus [in an individual delay case] may result in no more than line-jumping without resolving the underlying problem of the overall delay"). Thus, resolving the individual claims may contribute to longer delays for class members who do not bring their own claims. *Id.* ("a judicial order putting [petitioner] at the head of the queue simply moves all others back one space and produces no net gain" (quoting *In re Barr Labs., Inc.*, 930 F.2d 72, 75 (D.C. Cir. 1991))).

By contrast, a class action ensures that all class claims are resolved in a uniformly timely manner, without favoring individual petitioners. *Ebanks*, 877 F.3d at 1039-40 (endorsing class-wide relief over individual relief when veterans allege

delays in the adjudication of their cases); *Barnett v. Bowen*, 665 F. Supp. 1096, 1099 (D. Vt. 1987) (concluding that a class action is "essential" to ensuring that all claims for Social Security disability benefits are decided in a uniformly timely manner).

C. There is Uncertainty Whether the Defendant Will Apply the Judgment Uniformly.

A class action is superior to an injunction in an individual case when the Court cannot be certain that the defendant "would apply the judgment uniformly to all members of the proposed class." 2 Newberg on Class Actions § 4:35. Given recent reports of disarray at the VA, and the lack of any assurance by the Secretary that he will resolve the cases of the proposed class members in a timely manner, the CAVC cannot be certain that injunctive relief in an individual case would benefit the rest of the members of the proposed class. *See*, *e.g.*, James D. Ridgway, *Why So Many Remands?: A Comparative Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims*, 1 Veterans L. Rev. 113, 129 (2009) (noting that the VA system is plagued by outdated record-keeping practices, understaffing, disorganization, and lack of legal representation before veterans reach the CAVC); VA Office of Inspector General, Veterans Benefits Administration: Review of Claims-Related Documents Pending Destruction at VA Regional Offices (Apr. 14, 2017) (describing poor document retention related to veterans' claims). *See also* 2 Newberg on Class Actions § 4:35 (citing *Wilson-Coker v. Shalala*, No. 00-1312, 2001 WL 930770, *5 (D. Conn. Aug. 10, 2001) (rejecting the defendants argument that certification was unnecessary in a case for mandatory injunctive relief since

"the defendants have not formally committed to granting class-wide relief or taken any concrete steps to address the plaintiffs' concerns")).

Moreover, the value of a class action in ensuring that members of the class receive the relief afforded in the case is heightened where, as here, the "VA provides little transparency regarding how it is effecting [the Court's] decisions." *Roskinski v. Shulkin*, No. 17-1117, slip op. at 13 (Ct. Vet. App. Jan. 26, 2018) (Greenberg, J., dissenting). It is difficult to see how a precedential decision alone could afford effective relief in a case alleging unreasonable delays when "[t]he Court is often left to wonder whether its decisions are actually applied quickly, correctly, and uniformly." *Id.* (noting that "the Secretary was unable to provide *any* information" regarding the "status of claims relevant to the Court's decision") (citations omitted).

D. Class Actions Are Superior to Individual Adjudication For Addressing Systemic Problems.

Finally, courts have recognized that a class action is generally superior to a precedential decision in an individual case when the class claims seek "to bring about institutional changes." 2 Newberg on Class Actions § 4:35. Indeed, a Rule 23(b)(2) class action may be the only means of addressing systemic problems that affect individual class members in different ways. *See* David Marcus, *The Public Interest Class Action*, 104 Geo. L.J 777, 823-24 (2016). For example, a claim against prison officials for deliberate indifference to the health of prison inmates would be hard to pursue as an individual case because prison inmates would be affected in different ways by the common problem. One prisoner does not receive insulin, another does not receive mental health care. An individual suit might

remedy one of these harms, but it will not be able to remedy a policy of systemic indifference on the part of prison officials. *Id.* at 803-04 & 823-24; *see also Brown v. Plata*, 563 U.S. 493 (2011) (affirming class relief in class action involving overcrowding of California prisons); *Barrett v. U.S. Civil Service Comm'n*, 69 F.R.D. 544, 550 (D.D.C. 1974) (ordering United States Civil Service Commission to adopt class action rules for federal employees because "any action" for workplace discrimination necessarily "*involves considerations beyond those raised by the individual claimant*."), citing *Hackley v. Roudebush*, 520 F.2d 108 (D.C. Cir. 1975) (emphasis in original).

Cases alleging systemic problems in the administration of benefits by the VA are good candidates for class actions in the CAVC. *See, e.g., Nehmer*, 118 F.R.D. at 119-20 (noting that a class action would be an effective device to bring about change in VA regulations). In this case, for example, the petitioners allege "systematic delays in rendering decisions in response to timely NODs," Amended Pet. at 11 (Nov. 16, 2017) and the Secretary's own brief acknowledges that the VA faces "structural" problems. Sec'y Br. at 53. Evidence of such systemic problems may favor class certification. An individual case, particularly one alleging unreasonable delays, would not address structural problems harming other members of the proposed class. *See* Marcus, *supra*, at 823-24. The individual case will merely grant relief to the individual petitioner, without addressing the systemic problems that harm thousands of other veterans. A Rule 23(b)(2)-type class action

aimed at class-wide relief for class-wide harms, by contrast, is designed to respond to such systemic problems.

In sum, Rule 23(b)(2)-type class actions have provided a superior tool to resolve a wide variety of cases involving injunctive and declaratory relief. Class actions help overcome mootness problems, facilitate the uniform enforcement of a judgment, and promote institutional reforms in response to a wide variety of systemic problems in large government benefit systems.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on February 8, 2018, the foregoing Motion to Extend Briefing was e-filed via CM/ECF, which will serve notice to all counsel of record.

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